

## St. John's Law Review

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Volume 38  
Number 1 *Volume 38, December 1963, Number*  
*1*

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Article 12

May 2013

### Introducing: A Biannual Survey of New York Practice

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#### Recommended Citation

Siegel, David D. (1963) "Introducing: A Biannual Survey of New York Practice," *St. John's Law Review*: Vol. 38 : No. 1 , Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol38/iss1/12>

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## INTRODUCING: A BIANNUAL SURVEY OF NEW YORK PRACTICE

DAVID D. SIEGEL †

### NEW YORK PRACTICE COVERAGE

With this edition, *St. John's Law Review* inaugurates a special survey of CPLR material designed to keep practitioners abreast of the development of the new New York law of procedure. The survey will entail a treatment in each edition of the *Law Review* of recent developments, not only under the CPLR, but under such other provisions of New York law as concern procedure. For example, the New York City Civil and Uniform District Court Acts<sup>1</sup> and the Real Property Actions and Proceedings Law became effective concurrently with the CPLR (on September 1, 1963). As the cases appear on the CPLR, the Civil or District Court Acts, the Real Property Actions and Proceedings Law, and other procedural provisions of the Consolidated Laws the *Law Review* will keep abreast of them and, in each edition, set forth the more important cases in an integrated treatment of what is happening in the courts under the new law of procedure. By this means, the *Law Review* hopes to advise bench and bar alike of the growth and development of the new procedural law of the state as it is construed and applied. The treatment will differ from a text in that it will cover only the period preceding the respective edition of the *Law Review*. Cumulatively, it is contemplated that a continuing perspective of the new practice will be achieved.

For this edition, covering the first few months of the CPLR's life, only a few areas can be treated; there are few areas indeed in which case law has even begun to develop. The decisions so far have been primarily from special term—motion parts—and the motion calendars are heavy enough to preclude the kind of

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<sup>1</sup> For the purposes of this survey the New York Civil Practice Law and Rules will be referred to and cited as CPLR, the Civil Practice Act as CPA, the Rules of Civil Practice as RCP. The New York City Civil Court Act will be cited as CCA, and the Uniform District Court Act as UDCA.

background investigation that the construction of a new act requires. The problem is understandable, and indicates that it may be some time before one can point to a substantial body of case law under the CPLR. While the *New York Law Journal* has published literally hundreds of decisions citing CPLR provisions, few of them offer the kind of treatment that would make the case a valuable part of the anticipated case law.<sup>2</sup>

There is doubtless a hesitancy on the part of judges to go deeply into something that they do not yet fully understand. A number of courses have been offered on the CPLR by the State Bar Association, the Practising Law Institute, local bar associations, state and city trial lawyers' associations, and law schools, but these have been designed primarily to give background and highlights. An intimate knowledge of even one CPLR provision may not be sufficient to enable a judge to construe and apply it in a case where both sides can offer support for conflicting constructions. It will often depend on whether a given provision can perform its job independently, or whether its real meaning becomes clear only when read alongside other provisions. That is, the individual provision may by itself indicate a particular result on a point raised, but in the light of other provisions it might appear to warrant a different construction. The material on pleadings under the CPLR which makes up the second part of this article can illustrate this. Rule 3014 of the CPLR requires separate statement and numbering of allegations. If a pleading should appear which violates this requirement, an attorney might quickly conclude that he can make a motion to compel the separate numbering. Rule 3014 by itself could reasonably be so interpreted. But that provision is part of a new approach to pleadings that the Advisory Committee on Practice and Procedure devised; and actually, the movant who wants to compel his adversary to separately state and number does not earn a grant of his motion merely by showing that the pleading is not properly paragraphed and numbered. He must show that he is *prejudiced* by the pleader's failure to follow rule 3014. That requirement comes from section 3026, and must be applied upon any corrective motion under Article 30 of the CPLR.

A further illustration. Section 308(3) of the CPLR is not clear as to whether the "residence" it refers to means a residence in the state or a residence outside the state. In a given case, however, the matter may be academic, because it may be a case

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<sup>2</sup> There have been some important decisions, however, of which the most significant is a case decided by Justice Pittoni, *Steele v. De Leeuw* (Sup. Ct., Nassau County Nov. 6, 1963), 150 N.Y.L.J., Nov. 6, 1963, p. 17, col. 4. It will be discussed in detail later in this article, under the section entitled: *The Longarm Statute: Section 302, infra* at 195.

in which service outside the state is permitted anyway. Whether such outside service is permissible is governed by section 313. If it appears in a given case that section 313 is applicable, and extraterritorial service therefore available, the case is not a proper one for an independent construction of section 308(3). If the case falls under section 313, "residence" in section 308(3) can be a residence outside the state for that very reason.<sup>3</sup> Hence, the question of whether the "residence" of section 308(3) means an out-of-state residence in an instance where section 313 is not applicable would not be properly before the court. The tie in between sections 308 and 313 might further involve sections 301 or 302.

Problems of this nature pervade the CPLR. It may be difficult to apply a provision by its own terms independently of others; the difficulty is compounded when the provision is one of a set of provisions embodying, in the aggregate, an approach or a system applicable to a given procedural area. In many cases, it will only be after the bench and bar have developed some degree of familiarity with the *entire* CPLR that meaningful construction can begin to appear for individual provisions. That takes time.

With that background, I would like to highlight some of the cases available so far on matters of interest to the bar.

#### *The Transition Provision: Section 10003*

Perhaps most important to practitioners at the moment is the extent to which the CPLR will apply in pending cases, *i.e.*, in cases commenced prior to September 1, 1963. That entire problem was sought to be solved in just eight lines by Section 10003 of the CPLR, which reads:

This act shall apply to all actions hereafter commenced. This act shall also apply to all further proceedings in pending actions, except to the extent that the court determines that application in a particular pending action would not be feasible or would work injustice, in which event the former procedure applies. Proceedings pursuant to law in an action taken prior to the time this action takes effect shall not be rendered ineffectual or impaired by this act.

That is all there is on the subject.<sup>4</sup> The revisers did not attempt to spell out in detail the extent to which CPLR provisions

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<sup>3</sup> Since § 313 directs that service outside the state shall, when permitted, be made in the same manner as service is made within the state, § 308 (which provides for the methods of service within the state) must be looked to for out-of-state service methods to implement § 313.

<sup>4</sup> Except for the statute of limitations, which has a special transition provision: § 218. The latter is designed to protect plaintiffs by giving them, for any cause of action accrued prior to September 1, 1963, the benefit of either the CPA period or the CPLR period, whichever is longer.

would govern pending actions. Such an endeavor would have resulted in a transition statute perhaps as big as the CPLR itself. They took the wisest step, and left it entirely with the courts to decide to what extent prior law could be used in pending cases. That is the approach of the federal rules.<sup>5</sup>

One thing is clear immediately. If the action was commenced after September 1, 1963, the CPA and RCP are out of the picture. The court's discretion under section 10003, to permit resort to prior law, is applicable only to cases begun before September 1. But with calendars the way they are, section 10003 will have importance for a long time; it will not lose its vitality until the last "pending" case has been disposed of, and that may take years.

The following illustrations from cases decided after September 1, involving section 10003 either expressly or impliedly, may serve to assist the practitioner in determining how to proceed on a point involving transition.

*Perryman Burns Coal Co. v. Mandelbaum*<sup>6</sup> is an excellent case on section 10003. A summary judgment motion had been made prior to September 1, 1963. Procedure thereon did not, under prior law, contemplate that an order denying the motion, or granting it in part, would list facts found by the judge to be uncontroverted. But the new provision, Rule 3212(g) of the CPLR, specifically empowers the court to state such uncontroverted facts in the order (which facts are then deemed established and need not be proved at the trial).

Though the summary judgment motion had been made and decided prior to September 1, the order was not submitted until after that date. The order submitted was in accordance with the new rule 3212(g), listing facts which the judge found uncontroverted on the motion made prior to September 1. The question was whether an order submitted after September 1, on a motion made prior thereto, could follow the new practice. The

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The bar should also take note of a case decided by Justice Feiden, *Ernst v. Ernst* (Sup. Ct., Kings County Nov. 8, 1963), 150 N.Y.L.J., Nov. 8, 1963, p. 14, col. 5. It holds that those provisions of the CPA which went, not into the CPLR, but into other of the Consolidated Laws, are also to be governed by § 10003 of the CPLR. That is, to the extent such provisions have been in any way altered on matters of procedure, the changes should apply to causes of action accrued and even to actions commenced, prior to September 1, 1963. The specific provisions under discussion in *Ernst* were those that went from the CPA into the Domestic Relations Law. But the case would be authority for the application of § 10003 to CPA provisions going into any of the Consolidated Laws. Numerous of those provisions are now found, for example, in the new Real Property Actions and Proceedings Law.

<sup>5</sup> 1960 N.Y. LEG. DOC. NO. 20, FOURTH PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 155.

<sup>6</sup> 243 N.Y.S.2d 71 (Sup. Ct. 1963).

order submitted sought to exploit the new practice. The court accepted the order, holding that section 10003 was intended to make such procedure possible.

Of greater importance to practitioners will be the possibility of adverse consequences that may result because, in a pending case, the lawyer may not know to what extent he may rely on prior law as against the new law. A problem of that nature arose in the area of appearance. The CPLR has made a number of changes regarding appearance, which cannot be gone into here, but the long and short of it is that Section 237-a of the CPA and its approach to appearance is out, and the new provisions on the subject, section 320 and rule 3211(a) (8) and (e) are somewhat involved. The methods of appearing, and of making and preserving a jurisdictional objection are much changed by the CPLR. Even a practitioner familiar with the old *and* the new law may not be able to determine which he will be bound by in a case, *e.g.*, in which steps had been taken under prior law upon the assumption, reasonable at the time, that all further steps would follow prior law. If a jurisdictional objection had been raised under prior law, and follow-up steps taken in reliance upon it, what would happen to the jurisdictional objection if the matter is now to be governed by the new law, which has an entirely different set of solutions? A case involving such a problem is *Rothstein v. Autourist A/S*.<sup>7</sup> The defendant was confronted with this dilemma, and on a motion to resettle a prior order he asked the court to clarify the law by which he would be deemed bound. The court solved his problem readily. It told him that he may rely on prior law for all matters relative to appearance, and directed that the order should so provide. The dilemma was solved in one stroke by a wise exercise of the discretion lodged in the court by section 10003.

There have been other decisions on section 10003, but the above will illustrate what the provision can mean to the practitioner.<sup>8</sup> Some cases have taken a stricter view of section 10003 than the *Perryman* case adopted, holding that merely because a motion was made before September 1 it must in all respects be governed by prior law.<sup>9</sup> That view would appear too severe. Section 10003 is designed to give the court wide discretion on a case-by-case basis, and the court should not feel bound to prior law in

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<sup>7</sup> (Sup. Ct., New York County Sept. 17, 1963), 150 N.Y.L.J., Sept. 17, 1963, p. 11, col. 6 (Silverman, J.).

<sup>8</sup> *Steele v. De Leeuw*, *supra* note 1, treats of whether CPLR § 302 is retroactive.

<sup>9</sup> See, *e.g.*, *Sabin v. Raymond* (Sup. Ct., Nassau County Oct. 8, 1963), 150 N.Y.L.J., Oct. 8, 1963, p. 17, col. 2; *Berman v. Booth Memorial House* (Sup. Ct., Queens County Oct. 7, 1963), 150 N.Y.L.J., Oct. 7, 1963, p. 18, col. 1 (Herz, J.).

an instance where a new procedure may be applied without difficulty and without prejudice to any party. *Perryman* points up vividly the advantage of the leeway that section 10003 allows to the court.

*The Longarm Statute: Section 302*

Probably the most important contribution of the CPLR is section 302, a "longarm" statute that seeks to subject non-domiciliaries to the jurisdiction of the New York courts, even if the summons cannot be personally delivered to the non-domiciliary defendant within the state. It is activated by the defendant's transaction of business, commission of a tort, or ownership, use or possession of real property within New York; if the cause of action arises out of any of those in-New-York activities, the defendant may be served anywhere.<sup>10</sup>

The section has raised a number of questions, including whether it is applicable to corporations and whether it is retroactive. The bar has also been wondering what acts of a defendant would constitute a transaction of business sufficient to invoke section 302(a)(1). In what is probably the first major case under the CPLR, Supreme Court Justice Mario Pittoni has answered the first two questions outright and provided at least one answer to the third. The case is *Steele v. De Leeuw*; it appears in the *New York Law Journal* of November 6, 1963.<sup>11</sup>

Beleco was a foreign corporation not licensed to do business in New York. In its behalf, De Leeuw "executed a contract in the State of New York for the purpose, *inter alia*, of acquiring certain shares of stock. . . ." The corporation received the stock pursuant to the contract and "as such recipient became obligated under certain terms of the contract. . . ." The action brought against the foreign corporation was "based upon the contract."

As to whether section 302 is retroactive: Justice Pittoni held that it is. He held that the statute applies "even though the cause of action accrued and the action commenced prior to the effective date [September 1, 1963] of the statute."

Though section 10003 was not cited, it was necessarily involved. It is that section which mandates the retroactivity of the CPLR. The *Steele* case is authority for the application of section 302 not only when the cause of action has accrued prior to

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<sup>10</sup> Section 313 of the CPLR permits extraterritorial service where, *inter alia*, the case is one within § 302.

<sup>11</sup> *Supra* note 2. The case will probably be officially reported, and practitioners should watch for it in the advance sheets.

September 1, but when the action has been commenced prior to that date.<sup>12</sup>

As to whether section 302 is applicable to corporations: Justice Pittoni held that it is. The question had been troubling the bar because of the section's use of masculine pronouns and its reference to an executor and administrator. The Advisory Committee on Practice and Procedure intended section 302 to apply to corporations.<sup>13</sup> The Civil and District Court Acts assume it is applicable to corporations.<sup>14</sup> Nonetheless, the question had not been answered by the courts. Justice Pittoni's answer was quite casual, but clear: "In so far as a non-domiciliary is concerned, and that includes a foreign corporation not licensed to do business in this state, it is clear that. . . ."

Finally, the *Steele* case suggests a very liberal interpretation of section 302(a)(1), as to the acts that will constitute the transaction of business thereunder. The contacts that the corporation had with New York were stated by Justice Pittoni to be "the signing of this contract in New York, by Bernard De Leeuw on behalf of N. V. Beleco [the corporation], and the transfer of the stock, pursuant to the terms of the contract, to N. V. Baleco [sic]. . . ." The above, it was held, "were sufficient contacts within this state to constitute a *transaction of business* within the state, and finally that this action is based upon the contract hereinabove mentioned."

Thus, the making of a single contract in New York with a transfer of stock pursuant to it has been held sufficient contacts to invoke section 302(a)(1). The quantity of business that the defendant corporation contemplated in New York was not the subject of investigation. One contract plus the stock transfer activated the section.<sup>15</sup> This suggests that a different and more liberal yardstick may be used for defendants under the transaction of business requirement of section 302(a)(1) than will be used under the commission of a tort predicate of section 302(a)(2). As to the latter, cases construing analogous statutes have not contented themselves merely with the fact of an injury occurring within the state as the result of allegedly tortious conduct.

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<sup>12</sup> On the general subject of the retroactivity of § 302, see 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 302.04, at 3-35 (1963). See also 1958 N.Y. LEG. DOC. NO. 13, SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 478.

<sup>13</sup> 1 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 12, ¶ 302.05, at 3-37.

<sup>14</sup> See CCA § 404(d); UDCA § 404(d). The section (in each of the two acts) is modeled on CPLR § 302. See N.Y. JUDICIARY LAW, COURT ACTS § 404, commentary on revision (McKinney's 1963).

<sup>15</sup> There is precedent for basing an extraterritorial exercise of state jurisdiction on a single contract made within the state. See, *e.g.*, *Compania De Astral, S. A. v. Boston Metals Co.*, 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955).



Investigation was carried further. In the case of *Gray v. American Radiator & Standard Sanitary Corp.*, the court found by inference that the non-domiciliary defendant contemplated extensive sales of his product in the state.<sup>16</sup> In the case of *Deveny v. Rheem Mfg. Co.*, the court assured itself that the defendant could reasonably have contemplated consequences in the state.<sup>17</sup> In each, the investigation appeared to be the result of the court's doubt as to whether the fulfillment of the simple statutory criterion (injury within the state) would suffice under the due process clause.<sup>18</sup>

*Steele* was a commercial case, falling under section 302(a)(1), treating the transaction of business; the cited Illinois and Second Circuit cases involved analogues of section 302(a)(2), treating the commission of a tort. It is obvious that, insofar as the contacts doctrine is concerned, there is a difference between the transaction of business and the commission of a tort. The former is an intentional act; the latter is (at least in negligence cases) accidental. It is likely that more liberality will be shown in subjecting a non-domiciliary to our jurisdiction based upon an intentional business transaction within the state than based upon an unintentional injury inflicted within the state, especially when the negligent act or omission occurred outside the state. It is in the latter situation that the court will be more prone to seek out other factors to assure itself that due process of law is being accorded the defendant, and in that light we can understand why the *Gray* and *Deveny* cases seemed to look for more than the statute, by its terms, required.

### *Apparent Misconstructions*

At least two cases which have been officially reported appear, to this writer in any event, to make erroneous interpretations of CPLR provisions.

One such case is *Jensen v. Jensen*.<sup>19</sup> It was a special proceeding, which had been brought without specific statutory authority for it. Section 103(b) of the CPLR states that "all civil judicial

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<sup>16</sup> *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

<sup>17</sup> *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963), involving the Vermont "longarm" statute.

<sup>18</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to which all general "longarm" statutes must trace their constitutionality. And note the subsequent cases of *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), which appeared to expand the states' powers considerably, and *Hanson v. Denckla*, 357 U.S. 235 (1958), which reminded the bar that there are still limitations on the territorial jurisdiction of state courts. See also 1 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 12, ¶ 302.03, at 3-32.

<sup>19</sup> 243 N.Y.S.2d 25 (Sup. Ct. 1963).

proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized." Section 103(c) provides, however, that if a special proceeding is commenced when unauthorized, it "shall not be dismissed solely because it is not brought in the proper form. . . ." In the cited case, the special proceeding appears to have been dismissed only because it was not brought in the proper form (*i.e.*, as an action).

The court was apparently apprehensive about the petitioner's effort to (as the court said) "obtain a preference" by bringing a special proceeding rather than an action. But that could have been avoided without a dismissal. The court could merely have directed the petitioner to serve a complaint on the respondent, giving the latter twenty days to answer, and further directing that the litigation thereafter proceed as if a plenary action. That was apparently the kind of result contemplated by the revisers when they drafted Section 103 of the CPLR.<sup>20</sup>

Another case is *180 Tenants Corp. v. Ungar*.<sup>21</sup> The erroneous assumption that appears to have been made in that case is that the procedure of notice may be used to take depositions in a summary proceeding to recover possession of real property. Such a proceeding is a special proceeding,<sup>22</sup> and disclosure (including depositions) is available in special proceedings only by court order.<sup>23</sup> But the denial of the motion to vacate the notice was the equivalent of an order directing the disclosure to take place, which seems a fair result in any event.

In future editions of the *Law Review*, it will—one may contemplate—be possible to treat extensively the case law developing on the CPLR. In this edition because of the paucity of cases that decide important issues in the short time that the CPLR has been in effect, a general study of pleadings under the CPLR will be offered.

#### A PERSPECTIVE ON PLEADING UNDER THE CPLR: THE "MOTION YARDSTICK"

One of the most important areas of any practice code is its pleadings article, and with the advent of the CPLR it is urgent that both bench and bar understand the CPLR's approach to

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<sup>20</sup> 1959 N.Y. LEG. DOC. NO. 17, THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 47.

<sup>21</sup> 245 N.Y.S.2d 117 (Civ. Ct. 1963).

<sup>22</sup> See REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 701.

<sup>23</sup> CPLR § 408.

pleadings. This area of practice was the subject of much study and reflection by the Advisory Committee on Practice and Procedure, and the provisions drafted to cover it in article 30 import not merely a few new rules but, in effect, an entirely new approach. This article endeavors to set forth this new approach by use of what—for lack of a better term—I have called the “motion yardstick;” it consists of testing the adequacy of a pleading by the motions that the CPLR might make available against it. The “yardsticks” will be treated after a few preliminary matters are discussed.

If the new CPLR approach to pleadings is not understood and implemented during the early stages of the CPLR's life, it can be easily obscured. The slate is not wiped clean of prior provisions affecting pleadings: several CPA provisions have found their way into the CPLR, some with very little change even in form. But a number of new provisions appear, and the aggregate of these additions, when considered in light of the purposes that the Advisory Committee labored to effectuate, spell out the new approach. Pleading can be a good deal easier under the CPLR than it was under the CPA. Whether it will improve as much as the Advisory Committee intended depends entirely on whether the courts understand and execute the Committee's intent. The CPLR has all of the tools for carrying this out; it is merely a question of how they will be used. How they will be used by the courts depends, in turn, on how well the bar familiarizes itself with their intended use and stays with the new approach until it forms a well-understood and permanent part of our practice. If this is not done at the outset, the CPLR's pleadings provisions can become the implements for treating pleadings exactly as they were treated under prior law. That would constitute a reversion to some absurd pleading rules, and to a procession of corrective motions that have no purpose to serve for anyone except the lawyer bent on delay or harassment.

The purpose of this part of my article is to outline this new approach to pleadings in as simple a form as possible—to provide a perspective of what the CPLR wants of a pleading. Its scope cannot possibly cover the detail that the subject warrants. For this detail, I would refer the reader to volume 3 of *New York Civil Practice*, by Professors Weinstein, Korn and Miller, which sets forth an extensive study of pleadings under the CPLR, including comparisons with prior law and with the federal rules, integration of case law, and historical background. This article will refer to specific portions of that work from time to time. Attention, furthermore, will herein be directed to affirmative

pleading, *i.e.*, the pleading of a cause of action, rather than to denials and defenses.<sup>24</sup>

The fundamental pleading requirement of the CPLR is section 3013, which provides that:

Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

It is thus established at the outset that CPLR pleadings will have the primary function that pleadings have always had—that of advising one's adversary of the pleader's complaint.

Rule 3014 then repeats the CPA requirement of separate numbering, and this separate numbering requirement applies to "statements" as well as to "separate causes of action or defenses." Good pleading always dictates that no more than one allegation appear in a single paragraph. The CPLR, "as far as practicable," imposes this obligation on a pleader. To what extent, if any, may a motion be made against a pleading that does not follow this separate numbering requirement? We shall see.

The CPLR has a number of good things that come in very small packages. One of its best statements comes in its smallest package—section 3026. That section consists of but two lines, and lays the foundation on which must rest—if the bench and bar will let it come to rest—the CPLR's fresh attitude about pleadings. After providing that pleadings shall be liberally construed—which the CPA<sup>25</sup> dictated, also, with apparently little avail—it goes on to declare that: "Defects shall be ignored if a substantial right of a party is not prejudiced."

If the court should find any tendency on the part of an attorney to use any technical pleading requirement of the CPLR as a weapon to delay or oppress rather than as a tool to protect a legitimate interest of his client, the court can restrain him with no more than a citation to Section 3026 of the CPLR. The question will not only be: Did the pleader fail to follow a requirement of pleading? It will be that question *plus*: Is the movant *prejudiced* by the failure? Both questions must be put, and an affirmative answer to both must appear before the movant can prevail.

Suppose, for example, that the plaintiff has included two or three allegations in a single paragraph. He has quite clearly

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<sup>24</sup> It is the author's hope that the reader, at several junctures in the course of this article, will notice how repetitive it becomes. This will be particularly true when the CPLR "motion yardstick" is being applied to determine what has happened to the myriad pleading technicalities that supported corrective motions under prior law.

<sup>25</sup> See CPA § 275.

violated the one-allegation-per-paragraph edict of rule 3014. The violation may have been entirely unnecessary, *i.e.*, one that could readily have been avoided by the separate numbering of three readily separable allegations. The CPLR's attitude at this juncture is (and the judge's attitude should be): so what? Show me how you're prejudiced. Are you unable to understand the allegations? Can't you answer the paragraph? Is there anything there you want to admit? If you want to admit something, why don't you just state in your answer what you want to admit and deny all the rest?

If, indeed, the allegations are such that the movant cannot understand them, or cannot answer them, he should have relief; and in such case the CPLR does not withhold relief. But if the movant is playing games with the pleading, happily contemplating a slight delay, a bit of harassment, a dash or so of pressure to make the pleader settle for less than he is entitled to, the CPLR has put into the court's hand a small but powerful weapon which can be triggered by nothing more than: "The movant has not demonstrated prejudice. The motion is denied. CPLR § 3026."

I have referred to a "movant," yet I have not specified any motions. In fact, the illustration I have used implies a motion to separately state and number. While the CPLR has a specific requirement of separate numbering,<sup>26</sup> nowhere does it provide that a motion may be made to *compel* separate numbering. May such a motion be made?

The CPLR also expressly requires that a pleading contain "the material elements of each cause of action or defense."<sup>27</sup> Yet if such a material element is omitted from a pleading, there is no CPLR provision allowing a motion to compel the pleader to include it. Will such a motion lie?<sup>28</sup>

Rules 3015 and 3016 contain diverse pleading requirements applicable to particular causes of action. For example, it is required that the complaint state whether plaintiff or defendant is a corporation and, if known, the place of incorporation.<sup>29</sup> If a party is a corporation and the complaint omits to say so, will a

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<sup>26</sup> CPLR R. 3014.

<sup>27</sup> CPLR § 3013.

<sup>28</sup> If a material element is omitted from a cause of action or defense, a motion to dismiss would lie under rule 3211(a)(7) or (b). Our query at this juncture is: Will a corrective motion be available to compel the inclusion of the supposedly material element that the movant claims is omitted? The CPLR presents no difficulties when a cause of action or defense is not stated. Rule 3211 makes available the weapon of a motion to dismiss. If the cause of action or defense *is* stated, however, is there any other kind of motion to which § 3013 may give rise? It is the latter kind of problem that this article is concerned with.

<sup>29</sup> CPLR R. 3015(b).

motion lie to compel the allegation? There, too, no CPLR provision in terms authorizes such a motion. Will it lie by implication?

As to all of the above matters, it is not clear whether or not a motion will lie. The revisers had corrective motions in mind and, indeed, the CPLR has a provision covering the subject: rule 3024, to which I will come shortly. But the grounds for the motion are quite narrow and would not necessarily cover corrective motions on the grounds stated above. There may be cases where a motion on one or more of the above grounds is appropriate. Probably, it is best to leave the door open to them in a proper case. But one thing is certain: the only case that can be "proper" is one in which the movant can show *prejudice*. That requirement of Section 3026 of the CPLR pervades all corrective motions.

I have dwelt on the possibility of implied corrective motions, *i.e.*, corrective motions that are not expressly provided for by rule 3024, because I want to set forth what seems to me a simple but ideal way to measure the validity of a pleading under the CPLR, and perhaps the only way to effectuate the benevolent aim of the revisers to do away with the plethora of corrective motions that impeded pleading under the CPA. That way is to measure the pleading by the motions that could be made against it. If the pleader immunizes his pleading from all of the motions that the CPLR makes available against a pleading, it is a good pleading under the new practice and the attorneys had best turn their attention to the merits of the case.

It would be helpful to set out the specifically available motions first, though treatment of them is deferred until later. The motions are: (1) the motion to dismiss a pleading for failure to state a cause of action under rule 3211(a)(7); (2) the motion for a more definite statement under rule 3024(a); and (3) the motion to strike unnecessarily scandalous or prejudicial matter from a pleading under rule 3024(b). If the pleader so drafts his pleading as to immunize it from the above three motions, his pleading is, basically, a good one under the CPLR.

### *Keeping Implied Motions to a Minimum*

I used the word "basically" because I do not want to convey the impression that the above three motions are the only ones that lie against a pleading under the CPLR. They are the only ones expressly provided for. But since there are a number of pleading requirements, such as I have made brief reference to above,<sup>30</sup> the door must be left open to possible implied motions

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<sup>30</sup> See, *e.g.*, CPLR § 3013; RR. 3014-16.

under such other requirements as may be applicable in a given case. But these should not be frequent, and the courts should see to it that they are kept infrequent by denying any kind of corrective motion on which the movant cannot sustain a showing of prejudice.

A further example may be helpful. Using once again the requirement of separate numbering, suppose a plaintiff fails to separately number his allegations and puts everything into one or two paragraphs. Should his adversary be allowed a motion to separately state and number? An automatic "yes" is not consistent with the CPLR. If, though all in a single paragraph, the allegations are readily susceptible of answer, no motion would lie under section 3024(a) for a more definite statement. As to whether an implied motion would lie under rule 3014, aimed specifically at separate numbering rather than a more definite statement, that second question would have to be asked, as required by section 3026: is the movant prejudiced? If he is, the motion should lie. If he is not, it should not. In the example, it would seem that the movant is not at all prejudiced. Though several allegations are in a single-numbered paragraph, we have concluded that the movant is able to answer them. If he is, how is he prejudiced by the failure to separately state and number?

Now look at a pleading to which no response is required. Look at an answer containing no counterclaims,<sup>31</sup> but just denials and a few affirmative defenses. As I will show more fully in a moment, such a pleading is not subject to a section 3024(a) motion for a more definite statement. Is it subject, then, to an implied motion to separately state and number? Here, too, a conclusion depends on the facts of the case. Is the answer so poorly numbered, are its allegations so jumbled, that the plaintiff does not have notice of the defendant's position?<sup>32</sup> If so, plaintiff can show prejudice and avoid the bar of section 3026; the motion should lie.<sup>33</sup> If not, how is he prejudiced? And if he is not prejudiced, can any such motion be allowed him without ignoring the unambiguous instruction of section 3026 to ignore defects "if a substantial right of a party is not prejudiced?"

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<sup>31</sup> If an answer contains a counterclaim, the CPLR (like the CPA) requires a reply to it. CPLR § 3011.

<sup>32</sup> The basic requirement of the CPLR, in § 3013, is that *all* pleadings give notice of what the pleader relies on by way of cause of action or defense.

<sup>33</sup> By analogy to the Federal Rules of Civil Procedure, under which a similar problem arose, a motion to separately state and number could, if necessary, be implied. See *Porto Transp. v. Consolidated Diesel Elec. Corp.*, 19 F.R.D. 256 (S.D.N.Y. 1956). But § 3026 of the CPLR would make indispensable a showing of prejudice before the motion, even if implied, could be entertained.

And so it goes. Any and every activity relative to the correction of pleadings under the CPLR should, before the court intercedes, be shown to prejudice a substantial right of the moving party. A leading text on the CPLR has cautioned bench and bar alike to be wary of using the CPLR's pleading provisions as foundations on which to build a motion practice:

A motion under any of the pleading provisions in Article 30 that is corrective in nature and is not specifically authorized in CPLR 3024 should be permitted only if the alleged defect prejudices a substantial right of a party.<sup>34</sup>

The quotation should be faithfully heeded by the courts; it is the statement of those who were among the chief draftsmen of the CPLR. Their admonition gets even more specific. They point out that: "Motion practice can, if not restrained by the courts, develop under many of the provisions of Article 30. Prime spawning grounds include this provision [CPLR Rule 3024], CPLR 3015, and CPLR 3016."<sup>35</sup>

Since rule 3024 is the express corrective motion provision of the CPLR, the above is a reminder that section 3026, requiring defects to be ignored where no substantial right is prejudiced, is applicable not only to corrective motions that can be spelled out by implication at best, but also to the express corrective motions allowed by rule 3024.

If an extended motion practice develops in spite of all this, the cause will probably be traceable to the failure to start the CPLR off on the right foot. Now the CPLR is in its infancy. The habits it develops now will determine how well it behaves after puberty. If I may paraphrase an old adage about dogs and old age: it is hard to teach an old practice act a new approach. Right now the CPLR is very young. If it is to accomplish in the realm of pleadings what its draftsmen planned for it, it cannot wait very long. The courts should not be at all disposed to resist it. It should be a boon to a judge at special term. As soon as a corrective motion appears, his two questions should be: what do you want the pleader to do and how have you been prejudiced by his failure to do it? If the movant is articulate and clear in what he wants of the pleader, and even correct in his idea about the pleader's obligation, the judge should still deny the motion if not satisfied that the movant has been prejudiced by the pleader's error. If lack of prejudice plainly appears at the hearing on the return day of the motion, the motion should

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<sup>34</sup> 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3024.01, at 30-396 (1963).

<sup>35</sup> *Id.* at n. 3.



be denied then and there. A bonus to the judge will be that he has one less motion to take home.

*The Three Constituent Motions of the "Motion Yardstick"*

There is yet another compelling reason to resist finding motions by implication. Section 5701(b) and (c) of the CPLR has made orders on the *express* corrective motions—those provided in rule 3024—appealable only by permission, rather than as of right. It is another way that the legislature has chosen to publish its intention to diminish the place of corrective motions in New York practice. If corrective motions should be implied from other provisions of article 30, orders issuing on them would not fall under section 5701(b) and (c), and hence would not require leave to appeal. They would more likely end up under section 5701(a)(2)(iv) or (v), and therefore be appealable as of right. Such result would impute to the legislature an intention to give to motions it omits from the CPLR a greater dignity than it gives to motions it has expressly included. The court should have this in mind when it is asked to find corrective motions by implication.

The three basic motions that can be made against a pleading—those that are specifically provided for—should be the subject of somewhat more extensive investigation. These motions are, as indicated, (1) the motion to dismiss under rule 3211(a)(7); (2) the motion for a more definite statement under rule 3024(a); and (3) the motion to strike unnecessary scandalous and prejudicial matter under rule 3024(b). It will be noticed that (1) is a dispositive motion; if the motion is granted the pleading is dismissed. The remaining two are corrective motions; their granting brings about not a dismissal, but an amendment.

*Yardstick One: Does the Pleading State a Cause of Action?*

The first requirement of any affirmative pleading is that it state a cause of action. To set forth what a cause of action is, by way of example, would require as many examples as there are causes of action. What a cause of action consists of is not a question of procedure, but of substantive law. Under the CPLR, if a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated and no motion lies under rule 3211(a)(7).

The pleading can be pathetically drawn; it can reek of miserable draftsmanship. That is not the inquiry on a motion under rule 3211(a)(7). We want only to know whether it states a cause of action. If it does, a rule 3211(a)(7) motion does not lie and the pleading is immune from it. The pleading can consist of one twenty-five page paragraph with a thousand allegations. It can have not a single number appearing

anywhere in it, much less be separately numbered according to rule 3014. These factors, too, are irrelevant on a rule 3211(a)(7) inquiry, which cares not at all about whether the pleading is numbered properly or not. To use just a brief illustration, take a fraud cause of action. The "material elements" (required by section 3013) of the cause of action are, in general, these: (1) a representation, (2) its falsity, (3) reliance thereon, (4) scienter, and (5) damages.

If the twenty-five page monstrosity that we are using as an example sought to plead a fraud cause of action, and the above five elements could be found buried in it on, respectively, pages 7, 9, 14, 19 and 22, that pleading would state the cause of action and should not be dismissed under rule 3211(a)(7).

The foregoing is not to indicate that the CPLR invites that kind of pleading. Surely there is a remedy available to the one pleaded against: he can move for a more definite statement under rule 3024(a). But that is a matter distinct from whether the pleading states a cause of action, and that is the *sole* inquiry upon a motion under rule 3211(a)(7).

The federal rules do not use "cause of action," as section 3013 and rule 3211(a)(7) use it. The federal rules use the phrase "claim for relief."<sup>36</sup> It has been suggested that: "there is little evidence that the federal 'claim for relief' formulation achieves any different results from the New York 'cause of action' standard."<sup>37</sup>

And the Moore text on the federal rules states this:

While the Rules have substituted "claim" or "claim for relief" in lieu of the older and troublesome term "cause of action," the pleading must still state a "cause of action" in the sense that it must show "that the pleader is entitled to relief."<sup>38</sup>

The federal cases support that view.<sup>39</sup>

It is thus suggested that the federal criteria for judging pleadings is importable into New York practice under the CPLR. Whether the New York courts will turn to the federal cases for ideas about how liberally they may now regard pleadings is not a certainty. The mere use of the words "cause of action" in section 3013 and rules 3211(a)(7) and 3014 could be cited in support of the view that our pleadings are not to be as liberally regarded as in the federal courts, if the New York courts are

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<sup>36</sup> See FED. R. CIV. P. 8(a).

<sup>37</sup> 3 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 34, ¶ 3013.06, at 30-153, n. 40.

<sup>38</sup> 2 MOORE, FEDERAL PRACTICE ¶ 3.13, at 1704-05 (2d ed. 1953).

<sup>39</sup> See, e.g., *William Whitman Co. v. Universal Oil Prods. Co.*, 125 F. Supp. 137 (D.C. Del. 1954), cited in 2 MOORE, *op. cit. supra*, note 38, at n. 23.

disposed to hold back. But there is little to be said for such a disposition. Little, perhaps, but something. Few lawyers would say that it is wise to encourage the kind of pleading that the Second Circuit sustained in *Dioguardi v. Durning*.<sup>40</sup> There the pleading had been drawn by plaintiff pro se. The plaintiff was not merely unversed in the lawyer's skill of draftsmanship; he was not at all at home with the English tongue. Nonetheless, an indulgent Second Circuit searched through his delirious complaint and found not one, but two, "claims." While I believe our courts have ample room under the CPLR to reject such a pleading as failing to state a cause of action, under rule 3211(a)(7), I believe there is equal leeway to sustain it. A truly liberal treatment of article 30—and the injunctions abound, that pleadings are to be liberally construed<sup>41</sup>—could result in acceptance of a *Dioguardi* complaint.

My own hope is that our courts *will* go that far.<sup>42</sup> It would clearly set the range of the CPLR's approach to pleadings; and it would have the direct effect of casting out all the old nonsense that had CPA pleadings closer in tenor to early England than to modern America. We shall see.

Two final notes on that point, and I will proceed to the corrective motions. First, the primary aim of a CPLR pleading—taking the instruction directly from section 3013—is to give "notice of the transactions . . . intended to be proved and the material elements of each cause of action or defense." Could the Second Circuit have sustained *Dioguardi's* pleading if it failed to give what the CPLR calls "notice of the transactions," or if it did not contain the "material elements" that the CPLR requires? To my mind, the answer is no. Phrasing the answer in the affirmative, the conclusion would be that the *Dioguardi* court *did* find in his pleading such "notice" and "material elements." If so, then section 3013—the primary statute in point—itself opens the road to the federal practice. Second, the bar is surely aware of the

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<sup>40</sup> 139 F.2d 774 (2d Cir. 1944).

<sup>41</sup> Section 104 of the CPLR has a general provision dictating liberal construction of the CPLR. If that does not suffice, § 3026 of the CPLR may be cited; it contains a specific provision ordering that pleadings "be liberally construed." The latter is the provision which declares that "defects shall be ignored if a substantial right of a party is not prejudiced."

<sup>42</sup> It should also be remembered that, in spite of the recommendations of the Advisory Committee on Practice and Procedure, the bill of particulars has been retained in New York. See CPLR § 3041. In that regard, the tools available to one pleaded against to obtain details of the cause of action asserted against him are broader than those of federal practice; federal practice lacks a bill of particulars, though disclosure has a wider range in the federal courts than in New York courts under the CPLR. That factor should enable the courts to prevent the use of pleadings to obtain that which can be had via the bill of particulars.

practice in the state's lower courts that permits pleading by mere indorsement. That method of pleading, as all lawyers who practice in those courts are aware, permits a terse and summary statement of the cause of action to be "indorsed" on the face of the summons. It requires no formal or "long-form" pleading such as is used in the Supreme Court. Is it not amazing that the courts which permit indorsement pleading have survived for so long, and continue to get on quite well? When the New York City and Municipal Courts were merged into the New York City Civil Court in 1962, the Albert Committee<sup>43</sup> had to determine whether to continue the Municipal Court's practice of indorsement pleading or adopt the usual "long-form" pleading used in the Supreme Court. After much investigation, it was decided to retain the indorsement pleading, at least in a majority of the Civil Court's cases. When the New York City Civil Court Act was recast (and the Uniform District Court Act first drafted) in 1963, the indorsement pleading was continued in section 902 of the respective acts. The theory behind its continuance is that—very simply—it works. If so, why should it be dispensed with in favor of the Supreme Court's "long-form" pleading? In fact, has anyone ever seriously considered making the indorsement pleading available in the Supreme Court? The question is a legitimate one for discussion. And in any event, both bench and bar should call to mind the success of the indorsement pleading in the state's lower courts before developing any dire notions of what might happen to Supreme Court pleadings if the CPLR is liberally construed. The recollection will make it easier to abandon prior law notions of pleading.

*Yardstick Two: Is the Pleading Reasonably Susceptible of Answer?*

One of the two corrective motions specifically offered by the CPLR is the motion for a more definite statement in rule 3024(a). It applies where the pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a response. . . ." It is thus available only to a party who is required to *respond* to the pleading. It is available to a defendant required<sup>44</sup> to answer a complaint. It is available to a plaintiff who is required to reply to a counterclaim. It is also available to one against whom a cross-claim, third-party claim or interpleader claim is asserted, because each of them is required to answer such a claim.<sup>45</sup> If an answer contains no counterclaim, it cannot be voluntarily replied

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<sup>43</sup> The Committee's formal name is the Joint Legislative Committee on Court Reorganization.

<sup>44</sup> CPLR § 3011.

<sup>45</sup> *Ibid.*

to by the plaintiff; hence the plaintiff cannot move under rule 3024(a) to have such an answer made more definite. But in such instance the court may order the plaintiff to reply to the answer, and in such event the rule 3024(a) motion would become available to the plaintiff.

The motion is simple enough to understand on its own terms. The vagueness or ambiguity must be such as to make it unreasonable to compel a response to it. If it be somewhat vague or ambiguous, but still may reasonably be answered, the motion is unavailable. The prejudice to a responding party, which rule 3024(a) seeks to guard against, is stated right in the rule. It is probably true, therefore, that such a motion would not require the application of section 3026, which requires the court to ignore defects that are not prejudicial. Rule 3024(a) is available, because of its own terms, only upon a showing of prejudice, which reduces the importance of section 3026 in this instance.

Hence we have another motion which the draftsman of a pleading should guard against. This motion looks only to an amendment of the challenged pleading, not a dismissal of it.<sup>46</sup> With the dispositive motion of rule 3211(a)(7), the rule 3024(a) corrective motion is the second one that the draftsman should be aware of.

*Yardstick Three: Does the Pleading Contain Any Unnecessary Scandalous or Prejudicial Matter?*

The second, and last, specific corrective motion provided by the CPLR is that of rule 3024(b): the motion "to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." Note and underscore the word "unnecessarily."

If a plaintiff is suing her husband for divorce in New York, the allegation of adultery is a necessary part of her case. Adultery is scandalous, and the fact of it will not enhance the defendant's standing in the community. Hence the allegation is both scandalous and prejudicial, but in that case it is not "unnecessarily" so. Hence, the allegation belongs and the motion is obviously unavailable. In the context of an action on a promissory note, the same allegation becomes unnecessary, and the motion may be made to strike it out.

With that somewhat exaggerated example, the simple spirit of rule 3024(b) can be captured. The motion, like the motion for a more definite statement under rule 3204(a), does not (if granted) result in a dismissal, but merely in an amendment.<sup>47</sup>

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<sup>46</sup> See CPLR R. 3024(c).

<sup>47</sup> *Ibid.*

It constitutes the third specific motion that the CPLR makes available against a pleading.

*Summation on the "Motion Yardstick:" Some Qualifications*

The trio that makes up the "motion yardstick," to sum up, are: (1) the motion to dismiss under rule 3211(a)(7); (2) the motion for a more definite statement under rule 3024(a); and (3) the motion to strike scandalous or prejudicial matter unnecessarily inserted under rule 3024(b).

If the draftsman of the pleading proceeds with those three motions in mind, and successfully immunizes the pleading from the three of them, he has come up with a good pleading under the CPLR. To that general proposition, I must now add two conditions.

First, a reminder that the CPLR has a number of specific requirements, some of which are applicable generally<sup>48</sup> and some of which apply only in particular cases.<sup>49</sup> Article 30 has a number of such requirements. As was indicated previously in this article, such specific requirements can give rise to implied motions to carry them out. However that may be, they should in no instance be permitted unless the movant demonstrates prejudice under section 3026. The pleader should be aware of these provisions, however, regardless of the fact that the CPLR does not expressly provide for corrective motions to implement them.

Second, it should be borne in mind that we are here considering the pleading only as a pleading. The possible motions that we are using as yardsticks to measure the validity of the pleading relate only to its form, and not to its merits. Numerous motions may be made against the pleading on its merits, or on other grounds that defeat the cause of action, *e.g.*, statute of limitations, statute of frauds, release, and *res judicata*.<sup>50</sup> These are not relevant here.

*Prior-Law Motions Addressed to Pleadings Abolished by the CPLR*

With the "motion yardstick" in hand now, we can readily perceive some of the more obvious improvements in pleading under the CPLR. What has happened to the hypertechnical phenomena that so occupied judicial effort under prior law? What has happened to the word "facts," such as had to be pleaded

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<sup>48</sup> See, *e.g.*, CPLR § 3017; R. 3014.

<sup>49</sup> See, *e.g.*, CPLR Rr. 3015-16.

<sup>50</sup> See CPLR R. 3211(a), which lists the various grounds. Note that only one of the grounds listed—that in paragraph 7—relates to the pleading as a pleading.

under Section 241 of the CPA? What has happened to the "evidence" that the same provision banned from pleadings under prior practice? And where is an instruction to plead "ultimate" facts, as was deemed requisite to carry out the old law edict against "evidentiary" facts? Is a "conclusion of law" still anathema to a pleading? And what of the sham ground, and the frivolous ground, and the redundant, repetitious, unnecessary and impertinent ground under old rule 103, any of which could bog down a motion part under prior law? The fact is they are all gone.

Section 3013 and Rule 3014 of the CPLR speak of "statements" and "elements" and "allegations" and "matters," but they omit completely any reference to "facts." The fetish over how "facts" should be pleaded has been removed by the most obvious means available: the omission of the word "facts" in the directions about how to plead.<sup>51</sup>

Suppose a pleading contains "evidentiary facts" under the CPLR? It can do so with impunity, as long as the pleading states a cause of action, is reasonably susceptible of answer, and contains no unnecessary scandalous or prejudicial matter. The pleader's adversary has gotten *more* than he is entitled to when the pleader has set forth some of what he deems his evidence. On the other hand, if there is so much evidentiary matter in the pleading that it would be unreasonable to require an answer to it, the adversary can move against it. But the motion will not be one to strike evidentiary matter; it will be a motion for a more definite statement under rule 3024(a).

Suppose a pleading is not phrased in "ultimate" facts? Suppose it does what the CPA regarded as an outrage: it alleges something that might actually qualify as a "conclusion of law?" A CPLR pleading can do that with impunity too, so long as the pleading states a cause of action, is reasonably susceptible of answer, and contains no unnecessary scandalous or prejudicial matter. (If those words begin to sound familiar and this article begins to sound a little repetitious, it will have made its point!) The CPLR has cast aside the absurd battle<sup>52</sup> that has raged

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<sup>51</sup> The Moore text on the federal rules treats at length the subject: "Why the Pleading of 'Facts' Is Not Required." See 2 MOORE, *op. cit. supra* note 38, ¶8.12, at 1683. The approach is predicated on the absence of the word "facts" in the governing federal rules. Since New York's governing provisions under the CPLR also omit the word "facts," the road to the federal rules has been cleared of one of its most significant obstacles.

<sup>52</sup> For examples of the objectionable use of a "conclusion of law" in prior-law negligence pleadings, see *Pagnillo v. Mack Paving & Constr. Co.*, 142 App. Div. 491, 127 N.Y.Supp. 72 (2d Dep't 1911), decided during the reign of the Code of Civil Procedure, and *Newell v. Woodward*, 241 App. Div. 786, 270 N.Y.Supp. 258 (3d Dep't 1934), decided under the CPA.

between "ultimate facts" and "conclusions of law." Often that which constituted one would also qualify as the other, and Blackstone himself could not define the difference. If a pleading contains one or even several conclusions of law, no motion lies against it on that ground. If all it states is conclusory matter, it may not be susceptible of answer, which would permit a rule 3024(a) motion. Or, in the case of a pleading not required to be answered, it may be so devoid of information as to fail to give the "notice" required by section 3013. That might give rise to an implied motion pursuant to section 3013, and a showing of prejudice in such event could be made under section 3026 to satisfy that condition as well. But those are grounds entirely distinct from the mere ground that the pleading contains a "conclusion of law." That "ground" is no ground for a CPLR motion.

If a pleading is sham or frivolous, it should be attacked for failing to state a cause of action under rule 3211(a)(7). The movant will not be limited to what appears on the face of the pleading. Rule 3211(c) permits affidavits and other evidence to be submitted on a motion to dismiss under rule 3211(a)(7), so the movant will not be precluded from showing, by evidence, that the pleading is sham or frivolous and should therefore be dismissed because there is no cause of action. But the ground is not the sham as such, or the frivolity as such, but the broader ground that the pleading can be shown to state no cause of action. This is a phenomenon that New York practitioners will have to become accustomed to. It will be very difficult for one versed in the old practice to appreciate the possibilities open under the revisers' approach in rule 3211. If a pleading "fails to state a cause of action," as rule 3211(a)(7) phrases its ground, the practitioner would too quickly conclude that its failure must be apparent on its face. That is not true. The movant may go behind the pleading now, and by affidavits show that, though the complaint is handsomely drawn and purports plainly to state a good cause of action, there is in fact no cause of action because the pleading is a sham, or frivolous. So, no motion lies under the CPLR to strike a pleading, or matter contained in a pleading, because it is sham or frivolous. If the sham or frivolity has gone far enough to effect the entire cause of action, a rule 3211(a)(7) motion to dismiss is in order. If it falls short of that, the adversary can merely deny the supposedly sham or frivolous part.

If a pleading contains redundant or repetitious matter, the party pleaded against should deem himself doubly informed. If the pleading states a cause of action, is reasonably susceptible of answer, and contains no unnecessary scandalous or prejudicial matter, it is a good pleading and the redundancy or repetitiveness



means nothing. If it is so redundant and repetitive as to make it unsusceptible of an answer, a 3024(a) motion lies, but, barring that, redundancy and repetitiveness, however, out of place in a pleading, is not punishable under the CPLR by any motion at all. If the redundancy and repetition do not make the pleading unanswerable, the party pleaded against is not prejudiced; hence, section 3026 would preclude even an implied motion under rule 3014 which obviates repetition by providing that "prior statements in a pleading shall be deemed repeated . . . whenever express repetition . . . is unnecessary. . . ." <sup>53</sup>

If matter in a pleading is irrelevant or unnecessary or impertinent, the pleading is still a good one if—to repeat—it states a cause of action, is reasonably susceptible of answer, and contains no unnecessarily scandalous or prejudicial matter. If the matter is unnecessary or irrelevant, it ought not to reflect on the outcome of the case and might be ignored. If truly irrelevant, it might even be admitted. If irrelevant and untrue, it can be denied. If the irrelevancies are such as to make the pleading impractical of answer, a rule 3024(a) motion lies. If the irrelevancies do not reach that point, they do not prejudice the party pleaded against. If matter is impertinent, whether that word be taken to mean irrelevant or insolent, it is harmless, so long as the pleading states a cause of action, etc. If the word means insolent or flippant, it may well constitute "scandalous or prejudicial matter unnecessarily inserted," in which event a rule 3024(b) motion would lie. If the matter abounds in insolence and flippancy, but is relevant to the cause of action and proof of same could be received in evidence at the trial, it belongs in the pleading or, in any event, cannot be stricken from it under the CPLR.

What I have been doing in the foregoing discussion is pointing up how best to think of pleadings under the CPLR. In each instance of tracing what has happened to the myriad technicalities of prior law, I have been applying the "motion yardsticks" that the CPLR provides in rules 3024 and 3211(a)(7). I have warned of other motions that might arise by implication in a given instance but, for a perspective of pleadings, the three expressly provided motions offer, as I see it, the best insight into the

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<sup>53</sup> In *Brander v. Bierman*, (Sup. Ct., Kings County Nov. 13, 1963), 150 N.Y.L.J., Nov. 13, 1963, p. 17, col. 4 (Wecht, J.), the court ably demonstrates that the CPLR no longer affords a motion to strike matter from a pleading as sham or frivolous. The court then proceeds to analyze seven defenses in the answer, dismissing the fifth, sixth and seventh defenses as "repetitious of the first two defenses." Where is there authority in the CPLR to strike defenses as "repetitious," especially when there is no showing of prejudice to the movant? There was no finding of prejudice in the cited case, and there is no authority under the CPLR to strike defenses as repetitious.

CPLR's approach and the best precaution against a reversion to the pleadings system of prior law.

These "motion yardsticks" work not merely to manifest the disappearance of prior law motion grounds against pleadings; they provide perhaps the most direct insight into the intent of the Advisory Committee on Practice and Procedure in drawing the new pleadings article.

### *A Look at Some Federal Forms*

If the courts forbid nice distinctions between New York's "cause of action" and the federal "claim for relief," they will have cleared the road to the federal rules of all debris. Having done so, they will find a set of forms which is official in the federal courts and which can supply incisive guides for what can now satisfy in our state courts. For example, the second paragraph of form 6 of the official federal forms is the "Complaint for Money Lent." It is so pithy as to cause a New York lawyer to blink. It goes thus: "Defendant owes plaintiff . . . dollars for money lent by plaintiff to defendant on June 1, 1936."

What under the CPLR does it lack? It states a cause of action, precluding a dismissal motion under Rule 3211(a)(7) of the CPLR. It gives the defendant notice of the transaction relied upon by plaintiff, satisfying that primary requirement of Section 3013 of the CPLR. It also has the "material elements" of the cause of action, the other requirement of section 3013.

It is on that last point, however, that a lawyer bent on reversion to prior law will build his case. His protest will actually be that the pleading does not set forth enough to constitute what he was used to in pleadings under prior law. But he will have to justify his position under the CPLR. Lacking any provision about "facts," he will probably come to rest on the "material elements" requirements of section 3013, and use that to ground his argument. This pleading, he will urge, does not contain the necessary "material elements." But just what element does it lack? If anything additional were set forth in the above pleading, the added matter would be nothing more than an amplification of it. Amplification is the function of a bill of particulars. But it will not take too much effort to confuse a pleading with a bill of particulars: prior-law notions would make that easy, and prior-law notions are not readily legislated away. It will take more effort to separate the two. But that will be the effort that brings rewards.

The pleading exemplified above is a simple commercial cause of action. Lest the reader believe that the new pleadings provisions would not work on more complicated matters, let it be noted that the federal rules do not beg the question. Official form 9 of the

federal rules, for example, is the "Complaint for Negligence." In its second and third paragraphs, totalling just nine lines between them, a cause of action is set forth in a "pedestrian knockdown" case. There is even included, within the nine lines, an allegation of special damages and the sum incurred for them. To complete the scoff at New York's old pleading notions, the word "negligently" appears. There is everything to make a CPA-indoctrinated lawyer gasp; but there is everything to satisfy as a pleading under the CPLR. A cause of action is stated, which precludes a rule 3211(a)(7) motion; notice is given and the material elements are present, so section 3013 is satisfied; there is separate numbering, fulfilling rule 3014; the pleading is answerable, making the rule 3024(a) motion unavailable; and nothing prejudicial or scandalous is included which completes the picture by casting out a rule 3024(b) motion. The pleading has everything the CPLR wants.<sup>54</sup> If pain persists get a bill of particulars.

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<sup>54</sup> The CPLR now has the additional requirement that "special damages shall be itemized." CPLR R. 3015(d). This may tend to complicate pleading in actions, like negligence, where special damages are important. It should be noted that the requirement was imposed early in the drafting stage of the CPLR. 1957 N.Y. LEG. DOC. NO. 6(b), FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 65. It was drafted when the Advisory Committee had mind to abolish the bill of particulars. The bill of particulars was later reinstated. 1961 N.Y. LEG. DOC. NO. 15, FIFTH PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 437. See the explanatory note, *Id.* at 440. The Advisory Committee would probably have reconsidered the requirement that a pleading itemize special damages, if a bill of particulars were to be available to do that job, but the bill of particulars was reinserted after the Advisory Committee had concluded its labors. It is interesting in this regard to note that there are two fifth reports, one by the Advisory Committee and one jointly by the Senate Finance Committee and the Assembly Ways and Means Committee. The former is entitled the "Final Report" of the Advisory Committee; the latter is the "Fifth Preliminary Report" of the legislative committees. They are in marked contrast on the subject of the bill of particulars.

The Advisory Committee report contains a rule 3064 as its last provision in the pleadings article. The Legislative Committee's report has an additional rule: rule 3070. That rule 3070 is the original reappearance of the bill of particulars provision.

This background should be remembered. The reinstatement of the bill of particulars makes much less important the CPLR requirement of rule 3015(d) that special damages be itemized. If a pleading be attacked for failure to "itemize" special damages according to the provision, the court should inquire whether a bill of particulars can supply what is needed. If it can, the court should be hesitant to require that the pleading go any further on the subject than it already has; the bill of particulars will do the rest.

A different conclusion might be warranted in instances, such as in certain defamation cases, where special damages are an integral part of the cause of action itself. However that might be, the itemization of damages should not be used promiscuously to ground corrective motions in cases where special damages are not an element of the cause of action, and

If the bar appreciates and supports what the CPLR has tried to do in pleadings, the courts will soon shape article 30 into a living instrumentality that can remove the drudgery from pleading and permit more productive use of both the lawyers' and the judges' time.

If, several years from now, the case law on article 30 does not show the changes that were so enthusiastically contemplated by the revisers, the fault will not lie with the CPLR. It has provided all of the necessary tools. The question is only: how will they be used? A practice act is only words; it is for the courts to give them meaning and it is for the bar to advise the courts.

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where a bill of particulars can supply the necessary detail. On the general subject of pleading special damages, see 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE 30-204-09 (1963).







